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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 277

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND SWITCHMEN'S UNION OF NORTH AMERICA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court filed no formal opinion. The court's oral explanation of the reasons for its disposition of the case appears at pp. 216 to 220 of the record. The findings of fact and conclusions of law appear at pp. 225 to 236 of the record.

JURISDICTION

The judgment of the district court was entered on July 2, 1948 (R. 236-237).[1] The appeal was dock-

[1] The record is printed in two volumes, one entitled "Joint Appendix to Brief" containing the proceedings in the district which will be referred to as "R" and the other entitled "Vol. II" containing the proceedings in the Court of Appeals which will be referred to as "2 R."

eted in the Court of Appeals for the District of Columbia on July 9, 1948 (2 R. 75). The petition for a writ of certiorari was filed on September 14, 1948, before consideration of the merits of the appeal by the Court of Appeals. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In the face of a threatened strike by three unions of railroad employees which would have paralyzed the national rail transportation system, the United States by executive order of the President seized possession and control of the railroads involved. After seizure by the Government the unions persisted in their threat to strike. The United States thereupon obtained a temporary restraining order and eventually a permanent injunction which restrained the threatened strike. Thereafter the unions and the railroad entered agreements settling their dispute and the Government returned possession and control of the railroads to their owners. The Government subsequently moved for discharge of the injunction on the ground that the reasons for its issuance had ceased to exist.

The Government believes that the following two questions are dispositive of the instant application for certiorari:

1. Whether removal of the strike threat to which the injunction was directed by settlement of the dispute, and the return of the railroads to private possession and control, render the case moot.

2. Whether, assuming the case not moot, it contains circumstances which would warrant the extraordinary procedure of consideration by this Court in advance of judgment by the Court of Appeals.

CONTRACT PROVISIONS INVOLVED

The pertinent contract provisions are set forth in the Appendix.

STATEMENT

The facts as found by the district court may be summarized as follows:

Petitioners are three unincorporated labor organizations representing employees in the railway industry (R. 231, 232, 233). For a long time representatives of these organizations have engaged in various activities on behalf of their members in the District of Columbia and have maintained offices or affiliated with other labor organizations which have maintained offices in the District of Columbia (R. 231, 232, 233).

After failing to settle by negotiation a dispute concerning wages and working rules, petitioners on January 16, 1948, issued a strike call with respect to railroad carriers throughout the nation to become effective on February 1, 1948 (R. 225, 252-259). The strike was postponed when the machinery for mediation provided by the Railway Labor Act was thereupon invoked but no settlement of the dispute was reached (R. 225-226). On April 30, 1948, the petitioners notified the carriers that a strike would

commence on May 11, 1948, unless the issues in dispute were previously settled (R. 226). On May 10, 1948, the President issued Executive Order No. 9957 pursuant to which the United States, through the Secretary of the Army, took possession of and assumed control and operation of the railroads involved in the dispute (R. 227, 226).[2] The Secretary of the Army exercised full and complete authority over the operation of the seized railroads, although the former management continued to perform certain managerial functions by virtue of the express delegation of authority by the Secretary (R. 227-228). After seizure of the railroads, the chief executives of the petitioning unions advised the Secretary of the Army that the strike order previously issued for May 11, 1948, would not be cancelled (R. 227). The threatened strike, although involving only a small proportion of the railroad employees of the nation, would have resulted in an immediate shutdown of virtually all railroad operations (R. 230). Among other things, the threatened strike would have deprived the Department of the Army and military establishments generally of supplies and materials and available personnel necessary to the operations of the military at home and abroad (R. 230). It would have prevented the United States from carrying out its foreign rehabilitation and recovery programs, would have obstructed the per-

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[2] The Executive Order is reproduced in the record at pp. 266-270.

formance and discharge of vital governmental functions, would have imperiled the national health and safety, and would have caused the United States irreparable injury (R. 231).

On May 10th the United States sued for a permanent injunction against the threatened strike and obtained immediately a temporary restraining order (R. 233). The temporary restraining order was extended by consent from time to time until June 10, 1948 (R. 234). On June 10, 1948, after hearings on the Government's motion, a preliminary injunction was granted (R. 234) and on July 2, 1948, after hearing, a permanent injunction was entered (R. 236-237). After the merits of the controversy were disposed of, petitioners objected to the form of the injunction issued on the grounds (1) that it was "not limited to this dispute" and (2) that it was "not limited to a nation-wide strike" (R. 222). The court pointed out that the wording of the injunction was comprehensive to avoid possible evasion of its terms but that "it couldn't possibly comprehend anything except the substance of the issues before the Court" (R. 222).

The order granting the permanent injunction was appealed on July 6, 1948, and the case was docketed in the Court of Appeals for the District of Columbia on July 9, 1948 (2 R. 75). The petition for a writ of certiorari was filed in this Court before the case was heard or a decision rendered on the merits by the court below.

During the pendency of the case in the Court of Appeals, the following proceedings occurred:

On August 2, 1948, the United States filed in the Court of Appeals a motion to discharge the permanent injunction or, in the alternative, to remand the case to the District Court for the discharge of the permanent injunction (2 R. 9). This motion was opposed by petitioners (2 R. 14). On August 13, 1948, petitioners filed a motion to suspend further proceedings pending consideration by this Court of a petition for a writ of certiorari which they indicated they intended to file (2 R. 5). This motion was opposed by the Government (2 R. 76). On August 17, 1948, the United States filed a motion for disposition of the cause on the grounds of mootness which was opposed by petitioners (2 R. 24, 64, 76).

The Government's motions in the Court of Appeals disclose the following:

On July 8, 1948, petitioners reached an agreement with the former managements of the seized railroads regarding the issues as to wages, hours, terms, and conditions of employment which had given rise to the disputes resulting in the strike threat and seizure by the United States (2 R. 10, 26, 36). On July 9th, the President advised the Secretary of the Army of his wish to have the railroads returned to their owners promptly in view of the settlement of the disputes which were the underlying cause of seizure (2 R. 11, 27, 37). On the same day the Secretary of the Army terminated and re-

linquished possession, control, and operation by the United States of the railroads seized under the Executive Order (2 R. 11, 27, 38). On August 11, 1948, the three unions and railroad carriers which were parties to the agreement of July 8, 1948, executed two agreements and a Memorandum of Understanding (2 R. 28, 42, 60, 63).

One agreement recited that it was a full and final settlement of the disputes growing out of notices served on or about June 20, 1947, in accordance with Section 6 of the Railway Labor Act, of intended changes in agreement affecting rates of payment, rules, and working conditions (2 R. 28, 59). The other agreement recited it was in settlement of the dispute growing out of notices served on or about September 30, 1947, subject to the condition set forth in the Memorandum of Understanding (2 R. 61-62).[3] The disputes which were settled were the cause of the strike threat which culminated in the seizure of the railroads by the United States and the permanent injunction issued by the district court (2 R. 28).

The Government's motions asserted that the underlying labor disputes between the carriers and the unions had been irrevocably settled, the possession, control, and operation of the railroads had been returned to private owners, and there was no

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[3] The memorandum of Understanding provided that the portion of the wage request made on September 30, 1947, but not granted in the August 11th agreement, shall have the status of a new request served on June 30, 1948 (2 R. 63).

longer any threat of a strike (2 R. 12, 29). In its motion to discharge the injunction, the Government asserted that the need for the injunctive relief granted was no longer present (2 R. 12). In its later motion, the Government urged that the same facts rendered the controversy moot (2 R. 29).

The petition for a writ of certiorari was filed in this Court on September 14, 1948 (2 R. 8). On September 17, 1948, petitioner's motion to suspend further proceedings was granted before any action had been taken on the Government's motion to discharge the injunction or to hold the case moot (2 R. 7-8).

ARGUMENT

The Government recognizes the possible importance of the questions which the petition attempts to have this Court decide. We do not believe, however, that these issues are any longer presented by this case or that, if the issues are present, the circumstances of the case warrant departure from the normal course of appellate review.

1. The Government contends that the facts disclosed in the proceedings in the court below render the controversy moot. The disputes which gave rise to the threatened strike have been finally settled, and the strike threat growing out of these disputes, which led to seizure of the railroads by the United States, no longer exists. As a result of the settlement of the disputes and the dissipation of the strike threat, the railroads have been re-

turned to their owners. The reason for the injunction no longer exists and, since the injunction was intended to be limited to the particular situation, there is no subject matter with respect to which it may operate.

Although the command of the injunction is in general terms, the colloquy between the court and counsel which accompanied its issuance makes clear that it was intended to be limited to the particular strike threat which then confronted the national railway transportation system. When objection was raised to the scope of the injunction on the ground, among others, that "it is not limited to this dispute," the court disagreed with this interpretation of its order and explained that the comprehensive wording was necessary to prevent evasion but that "it couldn't possibly comprehend anything except the substance of the issues before the Court" (R. 222). Furthermore, the Government's complaint in this action demonstrates that it was directed to the specific railroad strike which was then threatening the nation (R. 2-6). Since this strike threat no longer exists and cannot be revived because of the final settlement of the underlying dispute, the force of the injunction is spent and the controversy is now rendered moot.

Since there is no conduct or threatened conduct which the injunction now does or can restrain, a determination of the legal questions raised by petitioners will be a decision on an abstract question

serving the sole purpose of an advisory opinion upon which petitioners and others may rely in the event that a strike threat arises at some other time out of some other dispute as a result of which the United States again assumes operation, possession and control of the Nation's railroads. The purpose of the petition to serve this end is clearly set forth in petitioners' statement "that they are entitled to know in this case, and for future cases, whether they have the right to strike or whether that fundamental right has now disappeared" (Pet. p. 20).

Since a judgment at this time can afford petitioners no effectual remedy and since the effects of the issuance of the injunction cannot now be undone or in any way remedied, it is submitted that the case is moot. "It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez,* 177 U. S. 378, 390; *Brownlow* v. *Schwartz,* 261 U. S. 216, 217; *Montgomery Ward & Co.* v. *United States,* 326 U. S. 690; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360; *St. Pierre* v. *United States,* 319 U. S. 41; *Chandler* v. *Wise,* 307 U. S. 474, 477-478; *Director of Prisons* v. *Court of First Instance of the Province of Cavite,* 239 U. S. 633, explained in *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 476; *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Jones* v. *Montague,* 194 U. S. 147; *Mills* v.

Green, 159 U. S. 651, 653; *Menken* v. *Atlanta,* 131 U. S. 405; *List* v. *Pennsylvania,* 131 U. S. 396; *Cheong Ah Moy* v. *United States,* 113 U. S. 216, 218; *Smith* v. *United States,* 94 U. S. 97; *United States* v. *Phillips,* 6 Pet. 776; *United States* v. *Wittmeyer,* 89 F. 2d 660 (C.C.A. 9).

Even if the injunction be construed to have continuing effect, so that its dissolution could be deemed to remove a restraint upon petitioners, the possibility of the renewal of circumstances in which it would be operative would seem so conjectural as to negate the existence of a genuine controversy. It seems questionable that jurisdiction should be assumed on the speculative assumption, in the event of a subsequent dispute between the same parties, that the elaborate machinery of the Railway Labor Act will be exhausted without settlement of the dispute, that a nation-wide railroad strike will again be threatened, that this will occur in a national emergency which will empower seizure of the roads by the United States, and that all these events will occur in circumstances making the injunction applicable.

Moreover, even if all these events should occur, the practical answer to the contention that the controversy is still alive and that something more than an advisory opinion on the legal issues raised is sought, would seem to be found in the Government's motions both in the district Court (2 R. 15) and in the court below to discharge the injunction on the

ground that the reasons for which the injunction was granted no longer exist. This action would appear tantamount to abandonment of a suit which itself may render a controversy moot. *C. M. Patten & Co.* v. *United States,* 289 U. S. 705; cf. *Hargis* v. *Bradford,* 283 U. S. 781. In any event, the case would certainly appear mooted upon discharge of the injunction as requested by the Government. For this reason, it seems that this Court should not be asked to pass upon the merits of a controversy in advance of the disposition by the court below of a motion which may result in mooting the questions in issue.

2. Even if it be assumed that the case is not moot, we submit that the petition for a writ of certiorari has been prematurely filed since the facts do not warrant the extraordinary procedure of decision by this Court in advance of judgment by the court of appeals. The acknowledged power to issue writs in cases undecided by the courts of appeals is one "not ordinarily to be exercised." *The Three Friends,* 166 U. S. 1, 49; *Amer. Const.* v. *Jacksonville Railway,* 148 U. S. 372, 385. And, indeed, certiorari rarely has been granted in such cases. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), p. 205. Thus, a writ has been denied where a judgment was "neither so important in its immediate effect, nor so far-reaching in its consequences, as to warrant this court in undertaking to control the cause

at this stage of the proceedings." *Amer. Const.* v. *Jacksonville Railway, supra,* at 385-386. When writs have been granted the Court usually has emphasized the public importance of a prompt decision (see *St. Louis, K. C. & C. R. R. Co.* v. *Wabash R. R. Co.,* 217 U. S. 247, 251; *Forsyth* v. *Hammond,* 166 U. S. 506, 514; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 344) or referred to the pendency of "appeals in other cases with similar issues [which] were ready for argument." *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 591; *Porter* v. *Dicken,* 328 U. S. 252; *White* v. *Mechanics Securities Corp.,* 269 U. S. 283; *Royal Insurance Co.* v. *Fleet Corporation,* 280 U. S. 320; *Eastern Equities Corp.* v. *United States,* 282 U. S. 409, 415; *United States* v. *Bankers Trust Co.,* 294 U. S. 240.

The considerations which have been considered sufficient to justify departure from the normal course of appellate review by certiorari are not present here. The facts relied upon to demonstrate the mootness of the case, even if insufficient to establish mootness, emphasize the absence of any pressing need for an immediate decision. In addition, since the mootness of the cause was controverted below, it would seem inappropriate for the case to be heard by this Court without the benefit of consideration by the court below of the elaborate agreements which the Government contends, and which petitioners deny, have resulted in mootness. Cf. *Labor Board* v. *Donnelly Co.,* 330 U. S. 219, 237;

Kennedy v. *Silas Mason Co.*, 334 U. S. 249, 256, 257.

Although the right to strike is admittedly a fundamental right which should not lightly be curtailed, the need for speedy decision in the instant case is difficult to perceive in the absence of any present circumstance in which the exercise of this right seems threatened with restrictions. It should not be assumed that the particular combination of circumstances previously described which gave rise to the specific issues presented by the petition are likely to recur in the near future. The general question of importance, namely, the right to enjoin strikes in industries seized, operated and controlled by the United States, has been decided in *United States* v. *Mine Workers,* 330 U. S. 258. If a situation should arise which involves a genuine "case or controversy" as to the applicability of that decision in circumstances in which there is a restraint on a strike in immediate contemplation, there will be opportunity to consider the necessity for accelerated review. Cf. *United States* v. *Mine Workers, supra.*

There is no occasion at the present time to hasten the consideration of what, in practical effect if not in fact, are abstract questions upon which the advisory views of this Court are sought. Not only would the Court be deprived of the advantages of a prior sifting of the new issues raised in the Court of Appeals, but, since the district court filed no opinion, the Court would also be without the bene-

fits of prior analysis of the contentions of the parties on the merits of the original controversy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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October, 1948.

APPENDIX

The following are excerpts from documents executed by petitioners and the railroads on August 11, 1948:

1. "This agreement made this 11th day of August, 1948, by and between the participating carriers listed in Exhibits A, B and C, attached hereto and made a part hereof and represented by the Eastern, Western and Southeastern Carriers' Conference Committees, and the employees shown thereon and represented respectively by the BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND SWITCHMEN'S UNION OF NORTH AMERICA through their Conference Committees.

"IT IS HEREBY AGREED:

* * * * *

"*Section 20*

"This agreement is in full and final settlement of the dispute growing out of notices served by the employees parties hereto and by the carriers parties hereto, on or about June 20, 1947, in accordance with Section 6 of the Railway Labor Act, of intended changes in agreements affecting rates of pay, rules and working conditions."

2. "This agreement made this 11th day of August, 1948, by and between the participating carriers listed in Exhibits A, B and C, attached hereto and made a part hereof and represented by the Eastern, Western and Southeast-

ern Carriers' Conference Committees, and the employees shown thereon and represented respectively by the BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and the SWITCHMEN'S UNION OF NORTH AMERICA through their Conference Committees.

"IT IS HEREBY AGREED:

* * * * *

"5. This agreement is in settlement of the dispute growing out of notices served by the employees parties hereto on or about September 30, 1947, in accordance with Section 6 of the Railway Labor Act, on the carriers parties hereto, of intended changes in agreements affecting rates of pay, rules and working conditions reading in part as follows:

> 'That effective November 1, 1947, all existing basic daily wage rates be increased thirty (30) per cent with a minimum money increase of $3.00 on the basic day. The same percentage of increase applied to the basic day will be applied to all arbitraries, miscellaneous rates, special allowances, and to daily and monthly guarantees.'

subject, however, to the condition set forth in the Memorandum of Understanding signed concurrently with the signing of this agreement relating to further handling of certain phases of such wage increase request."

3. "*Memorandum of Understanding*

"It is understood between the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees, parties to the wage settlement executed this date and the employees parties thereto represented respectively by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Switchmen's Union of North America, that a wage request limited to the matter of the difference between the $1.24 per day, covered by the wage agreement of this date, and the amount requested in the notices served by the employees represented by those organizations on or about September 30, 1947 shall be given the same status as if it had been served as a new request on June 30, 1948. The purpose of this understanding is to avoid the serving of new notices by the employees represented by said organizations on individual carriers and negotiations thereon on such individual carriers. This understanding is made under the peculiar circumstances of this present wage settlement and shall establish no precedent for the handling of other cases."

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